Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-717

Charles Gross,

Petitioner,

v.

Newburger, Loeb & Co., a New York Limited Partnership, Andrew M. Newburger, Robert L. Newburger, Richard D. Stern, Walter D. Stern, and Robert L. Stern, as Executors of the Estate of Leo Stern, Robert L. Stern, Richard D. Stern, Sanford Roggenburg, Fred Kayne, Robert Muh, Paul Risher, Charles Sloane, Robert S. Persky, and Finley, Kumble, Wagner, Heine, Underberg & Grutman, a Partnership (formerly known as Finley, Kumble, Underberg, Persky & Roth and Finley, Kumble, Heine, Underberg & Grutman), Newburger, Loeb & Co., Inc.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI OF CHARLES GROSS ON BEHALF OF RESPONDENT FINLEY, KUMBLE, WAGNER, HEINE, UNDERBERG & GRUTMAN

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Respondent Finley, Kumble, Wagner, Heine, Underberg & Grutman ("Finley, Kumble"), additional defendant on

counterclaims, appellant-cross-appellee below, submits this brief in opposition to the petition for a writ of certiorari filed by Charles Gross ("Gross") to review the judgment of the United States Court of Appeals for the Second Circuit entered on August 24, 1977.

This is one of two petitions seeking review of the Second Circuit's judgment in this case. Our petition—No. 77-727—sets forth the underlying facts, particularly as they bear on the jurisdictional issues. Consequently, we shall not burden the Court with a detailed rebuttal of Gross' factual presentation. We simply note that we do not fully accept that presentation—particularly where it is unsupported by record references—and respectfully refer the Court to our petition for a full rendering of the background facts.

Nor shall we engage in a lengthy debate on the merits of Gross' arguments, an exercise which is not appropriate here. Rather, we shall confine ourselves to the reasons why Gross' petition—of the thousands presented annually—does not present issues worthy of this Court's time and attention.

I

Gross' jurisdictional claim is not worthy of review.

Gross contends that the District Court had ancillary jurisdiction over a counterclaim alleging the conversion of certain securities. He concedes the following:

—The counterclaim raises only state issues;

—There is no diversity among the parties;

—The counterclaim is not related to the transactions alleged in the complaint and does not constitute a defense to the complaint;

—The counterclaim resulted in an award of damages against third parties—including Finley, Kumble—who were not parties to the case in chief.

These concessions underscore the obvious: Gross would dramatically expand the jurisdiction of federal courts. He would substantially increase the burden on federal courts. He would blur the statutory distinction between permissive and compulsory counterclaims. He would encumber the simplest federal case with unrelated state claims involving unrelated third parties.

We submit that certiorari should not be granted.

1. As Gross admits (Gr. Pet. 15, n. 1), and as the Second Circuit itself noted (A. 27a, n. 19),* he did not assert this argument below either in the District or the Circuit Court. This Court is generally reluctant to review matters not raised or resolved below. See *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976); *Singleton* v. *Wolff*, 428 U.S. 106, 120-21 (1976). It would not be a prudent use of the writ of certiorari for this Court to consider—much less adopt—a sweeping new rule without the benefit of argument, analysis and a decision in the lower courts.

2. The action began as a churning claim brought by plaintiff Newburger, Loeb. This counterclaim was asserted against plaintiff and third parties such as respondent Finley, Kumble. Prior to trial, on a motion for summary

* References are to the appendices of the petition for certiorari in Finley, Kumble, Wagner, Heine, Underberg & Grutman v. Gross et al., No. 77-727.

judgment, Judge Ward held that there was no federal jurisdiction over this counterclaim. The Court held that the counterclaim was available only as a set-off to reduce any possible judgment on behalf of plaintiff Newburger, Loeb. (A. 17a-18a).

At trial, the counterclaim was tried only as a set-off against the plaintiff corporation's churning claim. (B. 62a). Finley, Kumble had no interest in the trial of this issue because it was in the action solely as an additional counterclaim defendant and had no stake in any recovery against which the set-off would be effective. Only after trial of these issues did the trial judge retroactively amend the pleadings and award damages on the permissive counterclaim against Finley, Kumble on a conspiracy theory. (B. 76a-77a).*

The Second Circuit rightly concluded that this procedure was improper. It held that there was no jurisdiction over this claim, and that amendment of the pleadings to conform to the proof could not remedy this basic jurisdictional defect. (A. 32a-33a).

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* Gross' petition states that, at the outset of the trial, his attorneys gave notice that at the close of the evidence they would move to conform the pleadings to the proof with respect to this claim. (Gr. Pet. 12). This is erroneous. Gross refers to an instance at the outset of the trial in which plaintiff's attorney asked to be permitted to raise another legal theory with respect to its churning claim involving the same set of facts as the theories already before the Court. The request was granted. Gross' attorney then asked the Court:

> "This last minute amendment, may we bring in some additional amendments, too, your Honor, if they are appropriate."

The Court responded:

> "Let's cross that bridge when we come to it." (Trial tr. 30)

This offhand generalized request was clearly not notice that Gross would attempt to seek damages with respect to his set-off against Finley, Kumble.

Accordingly, the counterclaim was never even tried with respect to Finley, Kumble. In these circumstances, the imposition of liability offends due process. It would not be appropriate to grant certiorari on this issue with respect to Finley, Kumble.

3. The gist of the counterclaim is that Gross' securities were converted, for which he is entitled to damages of $132,803. While the Second Circuit rejected this counterclaim for lack of jurisdiction (A. 32a-33a), it affirmed liability on other counterclaims alleging conspiracy, and remanded the conspiracy claims to the District Court for a recomputation of damages. The briefing process on remand has been completed, and the matter is *sub judice* before the District Court.

On remand, Gross has contended, *inter alia*, that his damages for conspiracy should be increased by $132,803 because his securities were converted. In other words, Gross seeks, on remand, the very same $132,803 for the very same "conversion" that formed the basis of the dismissed counterclaim. If Gross is correct—and we have opposed him—his jurisdictional argument here is academic. Indeed, if Gross prevails on remand, he would have to withdraw his petition as moot. Under these circumstances, we respectfully submit, it would be ill-advised to grant the petition.

II

Gross' punitive damage claim is not worthy of review.

Gross urges a new rule permitting the federal courts to override state law and grant punitive damages for purely state claims to protect the dignity and integrity of the federal judicial process. This contention, too, does not warrant review.

First, this is not the proper case in which to review this question. Although Gross urged this new rule in the Court of Appeals, he did not do so in the District Court. There he argued only that he was entitled to punitive damages on the basis of New York law and on the basis of his federal antitrust claim, which was dismissed. The concept of an "inherent" federal power to impose punitive damages not permitted under state law—for a state claim—is an afterthought which did not have the benefit of District Court analysis and findings and should not be considered here. *See Singleton* v. *Wolff*, 428 U.S. 106, 120-121 (1976); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976).

Second, neither court below found that there had been any affront to its dignity and integrity.* The District Court found that punitive damages should be granted under New York law for injury to Gross caused by breach of fidu-

* Gross' entire argument is predicated on the District Court's indication, in a footnote, that there was a violation of Fed. R. Civ. Proc. 11. (B. 66a, n.19). But punitive damages under New York law and sanctions under Rule 11 turn on different considerations and are not mutually exclusive. The fact that the District Court did not grant any sanctions under Rule 11 indicates that the Court did not consider any such violation worthy of sanctions. There is no support in the record for the award of punitive damages that Gross requests.

ciary duty and violation of the New York Partnership Law. These damages turned on considerations which had nothing to do with the dignity and integrity of the federal courts. The Second Circuit reversed the District Court, concluding that the imposition of punitive damages was contrary to New York law without even bothering to mention Gross' "federal inherent power" theory. (A. 50a). Significantly, the Court expressed doubts on whether Gross could prevail on a state law cause of action for malicious prosecution or abuse of process. (A. 47a).

Third, Gross' argument that the federal courts have the power to and should award punitive damages to protect their dignity is entirely unsupported by any authority. The cases he cites are wholly irrelevant. Gross fails to point to a single case in which punitive damages were awarded to a litigant for an affront to the dignity and integrity of the Court. We submit that this is an improper forum to raise this question in that this Court has never had the benefit of the analysis and thinking of any lower court.

Fourth, punitive damages are neither necessary nor appropriate for the protection of "the dignity and integrity" of the federal courts.

The federal courts already have power to protect these interests. For example, Rule 11 itself is a tool that can be utilized for that purpose. So, too, is the contempt power, both civil and criminal. These powers are broad and flexible enough to meet any such violations. *See, e.g., Drivers, Chauffeurs and Helpers Local No. 639* v. *Penello*, 420 F.2d 632 (D.C. Cir. 1969); *United States* v. *Schiffer*, 351 F.2d 91 (6th Cir. 1965), *cert. denied*, 384 U.S. 1003 (1966).

Moreover, there simply is no reason why Gross should get a windfall for a supposed violation of the authority of the court. It is well settled that any such penalty should go to the government. It would be inappropriate for a private litigant to get anything other than compensatory damages in these instances. *Clark* v. *Boynton*, 362 F.2d 992 (5th Cir. 1966); *Lance* v. *Plummer*, 353 F.2d 585 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 929 (1966), *rehearing denied*, 384 U.S. 994 (1966). The same is true here.

Conclusion

For the foregoing reasons, Gross' petition for a writ of certiorari should not be granted with respect to Finley, Kumble.

Dated: New York, New York
December 21, 1977

Respectfully submitted,

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